THE BEAUTY OF *BELK*

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"The sky is falling." "We are at the end of times." "What rough beast, its hour comes round at last, slouches towards Bethlehem to be born?" To these iconic apocalyptic quotes, Professor Lynn LoPucki wants to add "Chapter 11's Descent into Lawlessness."[1] According to Professor LoPucki, we are approaching the end of times, at least when it comes to the corporate reorganizations of large companies. Chapter 11 no longer has any meaningful rules. Rather, the powerful can hire influential law firms which file cases in preferred venues, and then use the process to extract whatever value they want from the helpless. We are in a world where courts seeking to attract large corporate filings "flagrantly violate the law" or otherwise "offer . . . freedom from the law."[2] This is, and is intended to be, a shocking indictment. Over a decade ago, Professor LoPucki labeled the then-current system of bankruptcy venue as "corrupt."[3] That description now seems almost quaint. In the intervening years, Professor LoPucki asserts that the system has deteriorated even further- it is no longer bad law, it is simply not law.[4]

As the prime piece of evidence for his scathing account, Professor LoPucki trains his sights on the recent Chapter 11 case of Belk, Inc. ("Belk"), a large chain of department stores in the Southeast.[5] Belk certainly caught everyone's attention when it filed for bankruptcy on February 23, 2021, and emerged with a confirmed plan of reorganization 16 hours later. All agree

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[1] *See* Lynn LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANKR. L.J. 246 (2022).

[2] *Id.* at 300, 329.

[3] *See* LYNN LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (Michigan 2005).

[4] *See* LoPucki, *supra* note 1, at 309 ("[T]he competition [has] entered a new and more embarrassing phase . . . . This new variant of bankruptcy court competition is more virulent . . . .").

[5] *In re* Belk Department Stores, L.P., No. 21-30625 (Bankr. S.D. Tex.) (hereinafter "*Belk*").

that the time between filing and emergence was unprecedented.[6] Years ago, it was not uncommon for cases to last more than 16 months prior to plan confirmation.[7] Sixteen hours is breathtaking.

Standing alone, however, speed is not an indictment of the system. We take issue with Professor LoPucki's description of Belk and its restructuring. Rather than a case that illustrates the defects and lawlessness of the current system, a proper understanding of *Belk* highlights the best of the bankruptcy system. Advanced planning among all affected parties led to an outcome that should be applauded. The institutional creditors holding Belk's funded debt and the owners of Belk's equity reached a deal that injected new funds into the business to buy needed inventory, reduced the funded debt obligations by over 10 percent and extended the maturity of its remaining debt.[8] The transaction, in the modern parlance, created additional runway for the business to try to reverse its fortunes in a difficult retail environment. All trade creditors were paid in cash and in full. All of Belk's 17,000 employees retained their jobs without any reduction in their pay. Far from being lawless, Belk's restructuring complied with all applicable provisions of the Bankruptcy Code. Belk's bankruptcy case ensured that the transaction was completed in a quick and efficient manner that captured the parties' intent. The bankruptcy court, far from rubber stamping what was put in front of it, created a novel order to ensure that parties that were not part of the deal had their rights preserved. Rather than a cause for concern, Belk is a case for celebration.

I. Belk and the 2015 LBO

To understand Belk's restructuring, one needs to understand the

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[6] *See, e.g.*, Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy,* 2023 ILL. L. REV. 351, 407-13; Warren Shoulberg, *Belk Becomes the In-and-Out of Bankruptcy,* FORBES (Feb. 25, 2021, 11:37 a.m.), https://www.forbes.com/sites/warrenshoulberg/2021/02/25/belk-becomes-the-in-and-out-of-bankruptcy/?sh=6b72e5e73f1f.

[7] *See* Lynn LoPucki, *The Trouble with Chapter 11,* 1993 WIS. L. REV. 729, 741-42 (1993) (reporting a median time for Chapter 11 cases of 17.5 months); Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11,* 1 J. LEGAL ANAL. 511, 521 (2009) (reporting a mean of 15.6 months).

[8] *See infra* Part III.

events leading up to the bankruptcy case.[9] Belk is not a company that woke up one morning, found itself in financial distress and went running immediately to the bankruptcy court hoping to sort out its troubles in that forum. In other words, its Chapter 11 case was not a freefall bankruptcy; it was an extensively planned restructuring involving all major affected stakeholders.

Belk experienced financial distress for some time prior to its Chapter 11 case. This distress stemmed from the combination of two factors. The first, detailed in this part, was a leveraged buyout in 2015 that, like all leveraged buyouts, increased the company's leverage and hence its risk of financial distress.[10] The second, detailed in part II, was the pressure that all brick-and-mortar retailers suffered prior to and then during the COVID pandemic.[11] The extreme stress in the retail sector is not particular to Belk and continues to this day.[12] Belk's restructuring provided liquidity, reduced its overall debt and reduced the interest that had to be paid; it gave Belk a runway to address operational challenges. It did not (and could not) guarantee success.

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[9] Unless specifically noted otherwise, all factual information regarding Belk contained herein is from the Disclosure Statement Relating to the Joint Prepackaged Plan of Reorganization of Belk, Inc., and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, *In re* Belk, No. 21-30630, ECF No. 9 (Bankr. S.D. Tex. Feb. 23, 2021) (hereinafter "Disclosure Statement"). To do otherwise would result in the citations to the record in Belk overwhelming the content of this article. In addition to the disclosure statement itself, the "disclosure statement" filing also includes the plan of reorganization, the restructuring support agreement, term sheets for the reorganization, the financial projections, and the backstop commitments. We cite to the appropriate parts of the disclosure statement when applicable.

[10] *See* Brian Ayash & Mahdi Rastad, *Leveraged Buyouts and Financial Distress,* 38 FIN. RES. LETTERS (2021) (reporting that a leveraged buyout increases the probability of bankruptcy by 18%).

[11] *See* Denise Lee Yohn, *The Pandemic Is Rewriting the Rules of Retail,* HARVARD BUSINESS REVIEW (July 6, 2020), https://hbr.org/2020/07/the-pandemic-is-rewriting-the-rules-of-retail.

[12] *See* Pamela N. Danzinger, *More Retail Bankruptcies Are Brewing After Bed Bath & Beyond and David's Bridal,* FORBES (May 3, 2023, 1:56 p.m.), https://www.forbes.com/sites/pamdanziger/2023/05/03/more-retail-bankruptcies-are-brewing-after-bed-bath--beyond-and-davids-bridal/?sh=3e69f0414656.

A. The History of Belk and its Corporate Structure

Belk was (and still is) the largest privately owned chain of department stores in the United States. It traces its roots to North Carolina.[13] As more fully discussed herein, from the late 1880s through late 2015, it was a family-owned business. As Belk grew into a chain of roughly 300 stores, it spread across the Southeast. The growth was fueled by both opening new stores and acquiring competitors.

From its inception, Belk remained closely held by the Belk family. In terms of its equity ownership, the company had a dual class stock structure.[14] Class A shares could be converted at any time to Class B shares on a one-to-one basis, and the only difference between the classes of shares was that Class A had ten votes per share and Class B had one vote per share.[15] Over the years, some shares (both Class A and Class B) had been sold to people outside of the family, and some Class B shares had been issued as part of incentive compensation plans to various employees at the company. Still, by the middle of the 2010s, the number of Class A shares issued (over 38 million) was vastly greater than the amount Class B shares issued (less than 2 million). A little less than half of the Class B shares (less than 1 million) had been issued pursuant to executive compensation plans over the years. Thus, even without the preferred voting rights

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[13] *See* Disclosure Statement, *supra* note 9, at 17.

[14] The description of the events leading up to the leveraged buyout come from the 14(a) that Belk filed with the SEC. *See* Belk, Inc., Preliminary Proxy Statement (Schedule 14A) (undated), available at https://www.sec.gov/Archives/edgar/data/1051771/000119312515322684/d74172dprem14a.htm. Tim Belk was both CEO of the company and chair of the board. His brother Johnny was president of the company and also served on the board. Of the Board's 11 members, three were members of the Belk family. *See* Belk, Inc., Annual Report (Form 10-K) (Apr. 14, 2015), available at https://www.sec.gov/Archives/edgar/data/1051771/000119312515129159/d881575d10k.htm#toc881575_18 .

[15] Such dual class structures are a common way to keep founders and their families in control of a business. For summaries of the debate over the use of dual class stock, see Mike Burhart & Samuel Lee, *One Share – One Vote: The Theory,* 12 REV. FIN. 1 (2008); Renee Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence,* 12 REV. FIN. 51 (2008). Given that up to the leverage buyout, the Belk family held a vast majority of the shares, the extra-voting rights attached to the Class A stock were not, in fact, necessary to ensure that the family retained control over the company.

accompanying the Class A shares, the Class A shareholders held the vast share of the franchise when it came to shareholder voting.

At the same time, the Belk family owned well over 60 percent of outstanding shares in both Class A and Class B, putting them firmly in control of the company. No major proposal that required shareholder approval could gain traction without the blessing of the family. The shares outside the family traded infrequently and were not listed on any major stock exchange. At the time of its leveraged buyout in 2015, Belk had about 850 shareholders, including members of the Belk family.

At the start of 2014, Tim Belk was Chair of the Board of Directors (the "Board") and Chief Executive Officer of the company. He was the latest in an unbroken line of Belk family members who ran the company since its founding. Belk had always been headed by a Belk. Tim's brother, Johnny Belk, was the Chief Operating Officer. Like Tim, Johnny served on the Board. A third family member also served on the nine-person Board.[16]

B. The Buyout

Beginning in the latter half of 2014, Belk's senior management approached the Board, advising that the Board should explore strategic alternatives for the future of the company. The Board agreed with management's recommendation and Belk hired the investment firm Goldman Sachs ("Goldman") in January 2015 to explore what options existed. In making this decision, the Board stated that it had an obligation to maximize the value of Belk to its shareholders. The shares of Belk were thinly traded, leaving shareholders with limited ways to turn their shares into cash.[17] A sale would have the effect of monetizing the shares, both for

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[16] The three Belk family members on the board had substantial amounts of Class A shares. The remaining eight board members only held Class B shares. *See* Belk, Inc., Annual Report (Form 10-K) (Apr. 14, 2015), available at https://www.sec.gov/Archives/edgar/data/1051771/000119312515129159/d881575d10k.htm#toc881575_18.

[17] According to the Company's 10-K, "In fiscal year 2015, there was no established public trading market for either the Belk Class A Common Stock, par value $0.01 per share (the "Class A Common Stock") or the Belk Class B Common Stock, par value $0.01 per share (the "Class B Common Stock"). There were limited and sporadic quotations of bid and ask prices for the Class A Common Stock and the Class B Common Stock on the Over the Counter Bulletin Board and on the OTC Market, in the OTCQB Tier, under the symbols "BLKIA" and "BLKIB," respectively. As of April 3, 2015, there were

the Belk family and the outside equity holders.

In late 2014 through early 2015 Goldman shopped Belk to at least seven potential buyers and in July 2015, Sycamore Partners ("Sycamore") made an offer of $65.50 a share. At the time, Sycamore had more than $3.5 billion in capital under management and had already acquired a number of clothing retailers via leveraged buyouts (i.e., Aeropostale, Coldwater Creek, Dollar Express, Hot Topic, Nine West and Talbots). Unlike some of Sycamore's other transactions, however, Belk was not a turnaround project, it was a healthy company still seeking to expand its operations. Belk was not a distressed company seeking a white knight, it was closely held company where the family had decided to seek a financial exit.

After further negotiations between the Board and Sycamore, the latter's offer for the company was raised to $68 a share, resulting in a proposed purchase price of just shy of $3 billion. The Board formally accepted the offer on August 23, 2015. Under the terms of the sale, Tim Belk was to stay on as CEO, but Johnny Belk announced that he would soon be leaving Belk to "pursue other interests."[18] The new Chief Operating Officer, who eventually became CEO of Belk in September 2022, had been in the senior leadership team at three other retailers that were owned by Sycamore.[19]

When the buyout was announced analysts praised the reasonableness of the sale price.[20] The sale price was 6.67 times earnings before interest, taxes, depreciation and amortization ("EBITDA"). The higher the multiple of EBITDA, the more aggressive the price. Many transactions in the 2014 to 2017 had higher multiples. For example, in 2017,

approximately 546 holders of record of the Class A Common Stock and 278 holders of record of the Class B Common Stock." *Id.* at 15.

[18] Fraser Tennant, *Sycamore Partners Acquires Belk for $3bn*, FINANCIER WORLDWIDE (November 2015), https://www.financierworldwide.com/sycamore-partners-acquires-belk-for-3bn.

[19] *Belk Names Don Hendricks as Chief Executive Officer*, https://newsroom.belk.com/2022-09-09-Belk-Names-Don-Hendricks-as-Chief-Executive-Officer (last visited Sept. 12, 2023).

[20] *See, e.g.*, Richard Collins, *Why The Belk Buyout is a Steal for Sycamore Partners,* THE STREET (Aug. 27, 2015, 9:03 a.m.), https://www.thestreet.com/markets/mergers-and-acquisitions/why-the-belk-buyout-is-a-steal-for-sycamore-partners-13268395 (noting the deal's low EBITDA multiple, its undervalued real estate assets and its discount to other retailers).

one-third of buyout loans had a leverage ratio of over 7.0, a ratio higher than that of Belk's takeover.[21] Similarly, in 2014, the year before the Belk deal, the percentage of deals with a 7.0 multiple or higher was 40 percent.[22] Thus, the leverage ratio for the acquisition of Belk was roughly in the middle of the distribution of deals completed around 2015. It does not appear, even with the benefit of hindsight, that this was an aggressive overreach in terms of the pricing of the deal.

The structure of the deal also was not overly aggressive. As in common with private equity transactions, the funds generated to pay the departing shareholders came from newly borrowed funds and an equity investment by the private equity sponsor. There were four basic parts to the financing of the transaction that took Belk private. One was an asset-based loan ("ABL") secured by all the inventory and accounts receivable of Belk. The maximum amount that could be drawn under the ABL facility was $800 million. That said, these types of facilities typically have a "borrowing base" which limits how much can actually be drawn by the borrower.[23] In the Belk transaction only $158 million from the ABL facility was drawn down to finance the buyout.

The largest source of funds for the transaction was a $1.6 billion first lien loan secured by all of Belk's assets not pledged to the ABL. The first lien debt had an interest rate of the London Interbank Offered Rate ("LIBOR") plus 4.75 percent. When the transaction was agreed to, Sycamore intended this facility to be a $1.775 billion loan. However, the appetite for the debt in the market was less than anticipated and the financing banks[24] had to scale the loan back, reducing the size of the first lien facility to $1.6 billion.[25] The market also viewed the interest rate

[21] *See* Jonathan Schwarzberg, *LPC: Highly Leveraged U.S. Deals Still in Demand,* REUTERS, (Apr. 10, 2017, 2:29 p.m.). https://www.reuters.com/article/us-loan-leverage-idUSKBN17C26O.

[22] *Id.*

[23] For an overview of asset-based lending facilities, *see* Asset-Based Lending, Practical Law Glossary Item 2-383-6572, available at https://content.next.westlaw.com/practical-law/document/Ibb0a3a4fef0511e28578f7ccc38dcbee/Asset-Based-Lending-ABL?viewType=FullText&transitionType=Default&contextData=(sc.Default).

[24] Morgan Stanley, Bank of America Merrill Lynch, Credit Suisse, Deutsche Bank, Jefferies, Nomura, Royal Bank of Canada, Wells Fargo, and GSO Capital.

[25] *See* Jonathan Schwarzberg, *TRLPC: Belk Drastically Widens Discount on US$1.5bn Buyout Credit,* REUTERS (Nov. 18, 2015, 4:16 p.m.), https://www.reuters.com/article/belk-pricing/trlpc-belk-drastically-widens-discount-on-

assigned to the loan as too low. Belk discounted the loans at 89 percent, effectively raising the applicable interest rate, in order to generate sufficient interest in buying the loan.[26] As modified, at issuance, the first lien debt had a credit rating of B+, suggesting the company was solid but did have a chance of default going forward.

The third piece of the financing for Sycamore's acquisition of Belk was a $550 million second lien loan. GSO Capital Partners, now known as Blackstone Credit, took the lead in arranging the second lien loan. The lenders making the second lien loan were all part of the group of lenders providing funding for the first lien loan. The second lien loan was interest only and it did not carry a credit rating. The final piece of the financing was the equity component. Sycamore put in $658.8 million in cash, representing roughly 22 percent of the purchase price.

The buyout deal officially closed on December 10, 2015. The effect of the buyout transaction was to both transfer the ownership of Belk to Sycamore and to increase Belk's debt by a bit over $2.3 billion, with no corresponding increase in its assets. As with all leveraged buyouts, the increase in debt without a corresponding increase in assets increased the risk that the company would encounter financial distress.[27]

Seven months after the buyout, Sycamore partners brought in a new CEO, Lisa Harper, to run Belk. Harper had been CEO of Hot Topic for more than five years prior to her appointment at Belk. During her tenure at Hot Topic, the company had been acquired in a leveraged buyout by Sycamore partners. In other words, Sycamore moved the CEO from one of the companies in its portfolio to another company recently added to its roster. Harper was the first Belk CEO in its over 120-year history who was not part of the Belk family. However, Tim Belk, who had served as CEO for the previous twelve years remained on the Belk Board.

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us1-5bn-buyout-credit-idUSL1N13D2QQ20151118.

[26] Depending on which length of LIBOR applied as a reference point, the discounting raised the interest somewhere between 60 and 80 basis points (or LIBOR plus 5.50%). When the buyout closed in early December 2015, one year LIBOR was roughly 1.0%. *See Macrotrends: 1 Year LIBOR Rate – Historical Chart*, available at https://www.macrotrends.net/2515/1-year-libor-rate-historical-chart (last visited, Sept. 12, 2023).

[27] A recent study concludes that a leveraged buyout, on average, increases a firm's probability of bankruptcy by 18%. See Brian Ayash & Mahdi Rastad, *Leveraged Buyouts and Financial Distress,* 38 FIN. RES. LETTERS 101452 (2021).

Ten months after the buyout, in October 2016, Belk declared a dividend by which it paid $135 million to its sole equity holder, Sycamore. As with all dividends, there was a risk that the transfer could be set aside as a constructive fraudulent conveyance if was later determined that the company was in poor financial health at the time of the transfer.[28] Presumably to guard against such a future attack, prior to completion of the declaration, Belk secured an outside opinion that the company was solvent after the transfer.[29]

II. Events Leading to the Need for Restructuring

At the time of the buyout of Belk, Sycamore anticipated that the company's revenues would increase.[30] Unfortunately, this was not to be. Department stores by and large had a rough time even before the onset of COVID-19, and the timing of Sycamore's acquisition of Belk was correspondingly inauspicious. The first full year after Belk's buyout – 2016

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[28] *See* N.C. Gen. Stat. §§ 39-23.4; 39-23.5 (2022) (defining what is a voidable transfer under North Carolina Law; *id.* at §39-23-9A (applicable law is the law where the debtor's chief executive office is located).

[29] *See* Disclosure Statement, *supra* note 9, at 17-18.

[30] The projections for the proxy statement accompanying the solicitation for the LBO provided:

June Operating Plan Projections (dollars in millions)

	2016 Estimate	2017 Estimate	2018 Estimate	2019 Estimate	2020 Estimate
Revenue	$4,185	$4,322	$4,507	$4,614	$4,786
Gross Profit	1,673	1,736	1,819	1,872	1,951
EBITDA(1)	422	472	538	563	583
Depreciation and Amortization	178	192	200	205	200
EBIT	244	280	338	358	383
Adjusted EBITDA(2)	452	497	538	563	583
Unlevered Free Cash Flows(3)	196	136	230	256	262

Belk, Inc., Preliminary Proxy Statement (Schedule 14A) (undated) at p. 40, available at https://www.sec.gov/Archives/edgar/data/1051771/000119312515322684/d74172dprem14a.htm.

– saw department store revenues in the United States decline by 5.5 percent.[31] Things were even worse in 2017 as the retail sector saw an unprecedented decline with almost 7,000 store closures and more than 15 major retail bankruptcies in that year.[32] As a result, employment across the sector plummeted.[33] Belk was not immune from the decline in the fortunes of the brick-and-mortar retail sector, and it did not hit the revenue projections made at the time of the buyout.[34]

Faced with this challenging landscape, Belk agreed with a substantial majority of its lenders to amend the terms of its first and second lien loans in 2019. The goal of the amendments was to extend the maturity dates on the loans. Originally, the first lien loan had a maturity date of 2022 and the second lien loan matured in 2023. The effect of the extensions was that that bulk of the loans' principal would come due later, thereby giving Belk more time to turn its fortunes around before needing to refinance the maturing debt. Under the credit agreements governing the first and second loans, an individual lender could not have the maturity of its portion of the debt extended without its consent. Roughly 90 percent of the first lien holders and all but $25 million of the second lien holders agreed to the requested extensions.[35]

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[31] *See* P. Smith, *Department Store Sales in the United States from 1992 to 2021*, STATISTA (Aug. 29, 2023), https://www.statista.com/statistics/197712/annual-department-store-sales-in-the-us-since-1992/.

[32] *See* Debrorah Weinswig, *7 Retail Surprises From 2017 and the Opportunities They Present for 2018,* FORBES (Dec. 29, 2017, 12:18 p.m.), https://www.forbes.com/sites/deborahweinswig/2017/12/29/seven-retail-surprises-from-2017-and-the-opportunities-they-present-for-2018/?sh=62a66005562b.

[33] *See* Daniel Dorfman, *Retail Trade Employment: Before, During and After the Pandemic*, BEYOND THE NUMBERS: EMPLOYMENT & UNEMPLOYMENT, vol. 11, no. 4 (U.S. Bureau of Labor Statistics, April 2022), https://www.bls.gov/opub/btn/volume-11/retail-trade-employment-before-during-and-after-the-pandemic.htm ("Of these, general merchandise stores and clothing and clothing accessories stores accounted for the largest shares of employment decline within the sector, at approximately 29.0 percent each. From 2017 to 2019, both industries saw significant store closures partly because retailers struggled to compete with online competitors, consumers changed their preferences in favor of food services and travel, and demand increased for used and discount merchandise.").

[34] Professor LoPucki notes Belk's decline in revenues after the leveraged buyout, but he does not place this decline in context of the general decline in the entire sector. See LoPucki, *supra* note 1, at 260-61.

[35] *See* Disclosure Statement, *supra* note 9, at 20-21. Those notes that were not

Less than a year after the extension on Belk's loans, COVID hit and things went from bad to worse for the retail sector. The pandemic drastically increased the stress on all department stores, including Belk. Initial isolation shutdowns deprived the stores of in-person business. Even as stores began to reopen, such openings began cautiously and did not attract the same number of customers as they had pre-pandemic. Indeed, many retail companies filed for bankruptcy after the onset of COVID in 2020, including Neiman Marcus, J.C. Penney, Stage Stores, and Lord & Taylor. Lord & Taylor was the oldest department store chain in the country, but it never emerged from Chapter 11, instead liquidating and closing all of its stores. With bankruptcies, shutdowns and closures, employment across the retail sector nosedived.[36]

The effect of the pandemic on Belk's revenue was dramatic. From March 2020, when the country entered lockdown, to December 2020, Belk's revenue on a year over year basis decreased by 32 percent and its liquidity decreased by 70 percent.[37] These developments in the retail sector put a great deal of stress on Belk's cash flow.

III. The Restructuring Transaction

Due to the maturity extensions that Belk received in 2019 on the bulk of its debt, it was not in danger of imminent default on either its first or second lien loan at any time before its Chapter 11 case despite the impact of the pandemic. Still, with declining revenues and ongoing interest payments, Belk wanted to decrease its leverage. Moreover, it faced the problem of a dwindling supply of available cash. Cash is particularly necessary in the retail industry to fund inventory on a continual, rolling basis.[38]

In terms of funded debt, as of January 25, 2021, Belk had the

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extended retained their original maturity date.

[36] *See* Retail Trade Employment, *supra* note 33–("The clothing stores industry accounted for 38.6 percent of total retail sector employment loss from 2019–20. The decline reflected, in part, a shift in consumer preference to defer new clothing purchases, especially as more people began to work from home.")

[37] Disclosure Statement, *supra* note 9, at 22.

[38] *See* Will Kenton, *Inventory Financing: Definition, How it Works, Pros, and Cons*, INVESTOPEDIA (Jan. 28, 2021), https://www.investopedia.com/terms/i/inventory-financing.asp.

following capital structure:[39]

Funded Debt	Maturity	Outstanding Principal
ABL Facility	August 29, 2024	$357.5 million
First Lien Term Loan (Non-extended)	December 10, 2022	$101.5 million
First Lien Term Loan (extended)	July 31, 2025	$897.9 million
Second Lien Term Loan (Non-Extended)	June 10, 2023	$25 million
Second Lien Term Loan (Extended)	October 29, 2025	$525 million
	Total Funded Debt	$1,900 million

To provide additional liquidity and to reduce its funded debt, in November 2020 Belk began discussions with its sponsor, Sycamore, and the holders of its funded debt. As recounted above, Sycamore's buyout had been financed with loans rather than bonds and as a result there were relatively few debt holders. The second lien loan was held by only ten investors and the first lien loan had 217 institutions holding some part of the loan. From these lenders, two ad hoc groups were formed to lead the restructuring discussions: (1) a group of lenders holding only first lien debt and (2) a group of nine lenders that held both first lien debt and second lien debt.

There is no indication that Belk was in default on any of its obligations from the time that it entered into the negotiations up until its bankruptcy filing. Thus, neither the first lien holders nor the second lien holders could have declared a default and forced an immediate bankruptcy. Instead, Belk was motivated in large part to enter negotiations due to its precarious liquidity position along with its future debt service obligations.

After two months of negotiations, an agreement was reached among the parties. From a high-level perspective, there were four main elements to the deal. First, the existing investors – Sycamore and the first lien lenders – agreed to inject an additional $225 million into the business, with these

[39] Disclosure Statement, *supra* note 9, at 21.

funds intended to be used to buy additional inventory.[40] Second, the parties agreed to reduce the company's funded debt by roughly $300 million, or about 12.5 percent of this debt. Third, the maturities on all the funded debt not already extended were extended to July 31, 2025. Fourth, Sycamore's equity interest in Belk was reduced to 50.1 percent, with the remaining equity going to the lenders.

These were the only changes made by the agreed to restructuring. The ABL facility would remain in place and basically be unaffected by the restructuring;[41] all unsecured creditors, including the trade creditors, would be paid in full; all employees would be retained; and no stores would be closed. Stated otherwise, the restructuring affected only the first lien loan, the second lien loan, and Belk's equity. The restructuring focused solely on the balance sheet and was only among the holders of debt that financed the buyout and Sycamore. No operational changes were to be made as part of the restructuring.[42]

The details implementing this agreement are somewhat complex. The existing first lien term loan would be eliminated and replaced with a new $1.12 billion first lien term loan. The amount of the new loan was slightly more than the existing first lien loan, and it would be secured by the same assets that had secured the old loan. Most of obligations issued by this new facility would be exchanged for old debt (more on that below). The rest of the loan was in exchange for the new $225 million to be invested into

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[40] Disclosure Statement, *supra* note 9, at Exhibit C – Plan of Reorganization (hereinafter "Plan of Reorganization"). More precisely, Belk projected increasing its inventory by $188 million from the end of FY21 to the end of FY22. It also projected to decrease its accounts payable by $12 million. Cash would decrease from FY21 to FY22 largely because of the payment of the restructuring expenses.

[41] The facility's maturity date had been extended in 2019 to August 2024. *See* Disclosure Statement, *supra* note 9, at Exhibit C, note 18 to financial projections. At the end of the fiscal year FY21, there would be $390 million outstanding. This amount was projected to increase to $398 million the next year (after the restructuring had closed.) Plan of Reorganization, *supra* note 40.

[42] This is not to say that Belk was not making operational changes in an effort to improve its finances. It was. Like many brick and mortar retailers, it was attempting to increase the amount of revenue it derived from sales on the internet. The company, however, did not need any of the powers granted to debtors by the Bankruptcy Code to pursue these operational improvements. Moreover, it intentionally did not take advantage of the power to reject leases under Bankruptcy Code § 365. *See* 11 U.S.C. § 365. Such rejections could well have raised objections by the affected landlord, which would have made it more challenging to secure a quick confirmation.

Belk. Both Sycamore and the two ad hoc groups signed backstop commitment letters to ensure that these new funds would be available. Specifically, the lenders agreed to backstop a minimum $125 million of new debt, and Sycamore agreed to backstop the remaining $100 million. The new debt was not going to be issued to the market; rather, the sale of new debt was limited to the existing lenders.

As to the $125 million backstopped by the lenders, all holders of first lien loans could subscribe to the offering. If the existing lenders subscribed to more than $125 million – if, in other words, they viewed this as attractive investment – the amount the lenders could purchase could increase by an additional $35 million. Any increase in the amount funded by the lenders would lower the amount that Sycamore would have to invest as part of its commitment. Thus, as part of the transaction Sycamore committed to inject between $100 million and $65 million in new money into Belk. This money would not be an additional equity investment; rather, it would be a loan (Sycamore's first to Belk) on par with the new money lent by the existing lenders.

The total $1.12 billion new first lien loan would have two tranches – a "first out" tranche and a "second out" tranche. The general loan schedule provided that installment payments would be made on both tranches simultaneously. However, in certain large transactions (i.e., sale of the company), the first out tranche would get paid first, with the remaining funds then going to the second out tranche.

The first out tranche ("FLFO") would be $300 million of the new first lien loan, with an interest rate of LIBOR plus 7.5 percent and no amortization. The first out tranche was allocated as follows: first, $225 million to the lenders on the $225 million new financing. The next $45 million was allocated to the first lien lenders who agreed to fund the lenders' portion of new debt. The final $30 million was to be given to the first lien lenders who signed the backstop commitment.[43] In short, the old investors

[43] The backstop lenders were Apex Credit Partners LLC, Assured, Blackstone Alternative Credit Advisors, LP, First Eagle, FS Global Credit Opportunities Funds/Blair Funding LLC, Greywolf, Guggenheim Partners Investment Management, LLC, Hein Park Capital Management LP, Jefferies Leveraged Credit, KKR Credit Advisors (US) LLC, Katoriona Investment Pte Ltd., Davidson Kempner Capital Management LP, MJX, Nuveen Asset Management, LLC, SEIX, and Voya. Disclosure Statement, *supra* note 9, at Exhibit B - Restructuring Term Sheet 5, n1. Of the $30 million that this group was to share, 10%

contributed $225 million in new capital and received $300 in new obligations in exchange. The extra $75 million in promised payments were to go entirely to existing lenders. Sycamore only received debt equal to what it contributed; it did not receive any of the $75 million in additional repayment obligations.

The new first lien loan second out tranche ("FLSO") was $815 million and bore an interest rate of 10 percent. It had a PIK-toggle feature[44] available to the company for eight quarters during the life of the loan.[45] This option was not, however, an opportunity to make payments solely in new paper. If Belk decided to use the flexibility granted by the credit agreement, it had to pay the holders of the FLSO 5 percent interest in cash and 8 percent in additional debt. There was modest amortization with the FLSO tranche. Beginning in 2022, the loan would be amortized at 1 percent that year. The following year, the rate would increase to 2 percent. In 2024 and after amortization would be 2.5 percent. Given that the loan had a maturity date of July 2025, the result would be that less than 10 percent of the principal was to be repaid before maturity.

The FLSO would be distributed as follows. Holders of the of the old first lien loan were to receive 55 percent of the face value of their claims in new FLSO loan or a tad less than $550,000,000 of the new facility. This amount did not depend on whether or not the holder of the claim voted for the plan of reorganization. The first lien holders who signed onto the restructuring support agreement outlining the plan by February 2, 2021, would receive an additional 25 percent of their claims in the new FLSO, thus giving these lenders 80 percent of their claim. Holders of the old second lien loans were to receive 15 percent of their claim in new FLSO loans or $83,250,000.

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was paid in cash once the plan became effective. *Id.* at 5. Moreover, a subset of these parties would split an additional $12 million in cash on the day that the plan became effective. *Id.* at n2.

[44] A "PIK-toggle" term allows the borrower, under circumstances set forth in the loan documents, to choose to make an interest payment that is due in new indebtedness (payment in kind) instead of in cash. The payment switches from one in cash to one in new paper. *See* PIK Toggle, PRACTICAL LAW GLOSSARY, Item 7-382-3690, available at https://content.next.westlaw.com/practical-law/document/Ibb0a3930ef0511e28578f7ccc38dcbee/PIK-toggle?viewType=FullText&transitionType=Default&contextData=(sc.Default).

[45] While the credit agreement did not require for the quarters to be sequential, the expectation (and reality) was that the quarters would be the first eight quarters of the loan.

There was also a new second lien loan facility of $110 million with an interest rate of 10 percent, but payment of this interest was in kind. In other words, Belk would not have to pay cash on the new second lien during the life of the loan. The holders of the old second lien loan were to receive all of the obligations in the new second lien facility.

Putting all this together, entering into the negotiations with its debt holders, Belk had $1.55 billion in funded obligations between the first and second lien notes. After the transaction, its funded obligations on the new facilities were reduced to $1.23 billion. In other words, the funded debt of the company was to be reduced by $300 million.[46]

Equally as important, given the liquidity concerns that led Belk to seek to revamp its capital structure through the restructuring, Belk received relief on its interest rate payments. To be sure, the company would have to pay interest on the new first lien loans. On the other hand, it would never have to pay the second lien loans' interest in cash compared to the old second lien loans that required regular interest payments. Additionally, if Belk used the PIK-toggle feature for the FLSO loans for the first two years, it would make 5 percent interest payments in cash to holders of the second out tranche. Indeed, the financial projections filed with the plan of reorganization assumed that the company would use the PIK-option for the

[46] In a press release, Belk and its attorneys in the bankruptcy court assert that the company was deleveraging its balance sheet by $450 million in this transaction. The projected balance sheet accompanying the plan, however, confirms that indebtedness would be decreased by the $300 million stated in text. *See* Disclosure Statement, *supra* note 9, Exhibit C – Plan of Reorganization at Exhibit C Financial Projections Projected Balance Sheet (hereinafter "Financial Projections"). The explanation for this difference is that Belk planned to use the new money that received from the existing lenders and Sycamore to pay down about $150 million on the ABL facility. The projected decrease in the amount outstanding on the ABL, however, would be temporary as the company planned on new borrowing from the ABL facility. *See id.* It should be noted that Professor LoPucki lists a debt reduction of almost $600 million. See LoPucki, *supra* note 1, at Table 1. He lists the entire first lien term loan facility for the new first lien loan as $774.7 million. This figure, however, cannot be squared with the terms in the plan of reorganization. Moreover, published reports by third parties on the debt after the reorganization list the figures as in line with those in the plan of reorganization. *See Belk's Debt Ratings Downgraded on Weak Results*, SGB MEDIA (Feb. 6, 2023), https://sgbonline.com/belks-debt-ratings-downgraded-on-weak-results/ (referring to $300 million FLFO, $815 million FLSO and $110 million second line debt outstanding).

first two years after confirmation.[47] While the stated interest rate on the new money FLFO tranche was higher than on the old loans, the new capital structure as a whole reduced Belk's cash outlay (and therefore improved its cash flow) significantly, at least for the first two years after confirmation.[48]

Finally, the restructuring allowed Belk to extend the maturity date on all the first lien debt to July 2025. While 90 percent of the old first lien debt had been extended to 2025 in 2019, over $100 million of debt still had a maturity date of December 2022 and $25 million of the original second lien debt still had a maturity date of June 2023. The new loans meant that Belk did not have to worry about refinancing its debt for another four years.

With this understanding of how the restructuring altered Belk's prepetition debt, we now turn to how it adjusted the prepetition equity of the company. Prior to the transaction Sycamore owned 88 percent of the equity in Belk, with the remaining 12 percent owned by two investment banks that had been involved in the buyout and held debt as well. After the transaction, Sycamore's interest was reduced to 50.1 percent, and the pre-restructuring equity interests of the investment banks were eliminated. The remaining 49.9 percent of Belk's equity went to the prepetition lenders. Holders of the old second lien loans received 34.9 percent of the new common in exchange for their old loan with the remaining 15 percent going to the first lien lenders who funded the $125 million in new money.

In addition to the financial restructuring, the transaction also included a release of Sycamore for any potential fraudulent conveyance liability.[49] The one transaction that the lenders could have asserted was a

[47] *See* Financial Projections, *supra* note 46, at n.20.

[48] Because we do not know all the financial details of the old loans, we cannot put a precise figure on the amount by which the restructuring decreased the cash outlays required of Belk. However, we can determine that the first tranche bore an interest rate of LIBOR plus 7.5, whereas the old first lien loans were LIBOR plus 4.5 resulting in an increase in interest owed to $9 million a year. Offsetting the interest increase was a decrease, for two years, in the interest owed on the second tranche. LIBOR at the end of February 2021 was 84 basis points, so the interest on the old loans would have been 5.34% initially, a savings of 34 basis points. These savings increased as the Federal Reserve began raising interest rates a year later. Also, the old second lien loans had cash interest payments, where the new ones did not. Finally, there was no amortization of any of the loans during the first two years.

[49] There seems to have been little risk that the leveraged buyout in December 2015 itself could have been challenged as a constructive fraudulent conveyance. Such challenges tend to occur when a company has defaulted on its obligations. Belk was not in default on

constructive fraudulent conveyance was the $135 million dividend paid by Belk to Sycamore in September 2016 for which Belk received no value. The lenders would have had an uphill battle in prevailing in such an attack. To prevail, they would have to show that the transfer left Belk insolvent, too thinly capitalized, or not able to pay its debts as they became due. Proving that Belk was in poor financial condition after the dividend, however, could well have been challenging because of the solvency opinion that was completed at the time of the transaction. Sycamore could have made a showing that Belk could pay its debts as they become due as it had been doing so over four years after the dividend. It is far from certain that a challenge on a fraudulent conveyance claim would prevail. It is thus not surprising that the two independent directors that Belk appointed on December 17, 2020, to investigate the fraudulent conveyance action approved the release.

Much, if not most, of the restructuring transaction could have been done without a Chapter 11 filing. It would have been straightforward to put together a debt exchange that had the same economic terms as the Chapter 11 plan. The parties, however, decided to consummate the transaction through Chapter 11.[50] The parties who were being affected by

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any of its obligations. Moreover, a fraudulent conveyance lawsuit in the absence of a bankruptcy would require an unsecured creditor to undertake such an attack. Those in the lending group had no incentive to argue that their loans were obtained as part of a fraudulent conveyance. Belk did not have any other creditors other than trade debt, which was being paid as it became due. Moreover, any creditor seeking to avoid the transfers that were part of the buyout would have to have been in New York. The statute of limitations for fraudulent conveyance actions in North Carolina, where Belk's headquarters is located, is four years, and four years had passed. New York famously had a six-year statute of limitations at the time of Belk's LBO. Finally, even if there were an unsecured creditor from New York who could allege that under New York law the buyout was a fraudulent conveyance, the creditor would have to show that Belk was left in shaky financial position after the transfer. Such a showing would be difficult given that, as of February 2021, Belk was over five years past its LBO.

[50] The documents do not reflect why the parties chose to commence a Chapter 11 bankruptcy case. One potential reason is that, by filing a bankruptcy petition, the parties ensured that all post-petition disputes would be heard by the bankruptcy court, a neutral third party. Another potential reason is that by having a court issue an order treating the new debt contributed by the equity sponsor as debt, it would be less likely to be subsequently recharacterized as an equity contribution should Belk need additional restructuring.

the restructuring transaction crafted a restructuring support agreement ("RSA") that set for the terms of the proposed Chapter 11 plan. By January 26, 2021, all the second lien holders and holders of over 75 percent of principal amount of the first lien debt had signed the RSA.

On January 26, 2021, Belk began soliciting votes on the plan, sending the disclosure statement and the plan of reorganization to all creditors entitled to vote on the plan. Eventually, all the affected creditors that voted, voted in favor of the plan.[51] Also on January 26, notice of the plan was sent out to all of Belk's creditors, including those whose claims would be unimpaired by the plan.

Belk filed its Chapter 11 petition in the evening of February 23, 2021, in the Bankruptcy Court for the Southern District of Texas. The case was assigned to Judge Marvin Isgur, one of the two judges on the district's complex case panel. Although the parties would have known that the case would have been assigned to either Judge David Jones or Judge Isgur, assignments between the two were randomized and computer generated. The parties learned which judge would be assigned the case only when the petition was filed and the randomly assigned judge was designated. Judge Isgur reviewed the filings that night and opened court at 8:00 a.m. the next day. Judge Isgur informed the parties that he was concerned that there may be parties that were having their rights affected by the plan, even though the plan by its terms stated otherwise. To protect against the potential of inadvertently compromising the rights of those not in court, Judge Isgur told the attorneys that he would confirm the plan only if a "due process preservation order" was created as a guardrail to protect those not in court (the "Due Process Preservation Order").[52] The Due Process Preservation Order provided that "⟦a⟧ny person or governmental unit alleging that it had inadequate due process notice and opportunity to object to the Plan or Confirmation Order may file an objection to the Plan or Confirmation

[51] All the second lien holders voted. Less than four percent of the first lien holders (equaling less than 1% of the first lien claims in aggregate) did not vote. Declaration of Craig E. Johnson of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Joint Prepackaged Plan of Reorganization of Belk, Inc., and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, *In re* Belk, Inc., No. 21-30630, ECF. No. 33 (Bankr. S.D. Tex. Feb. 23, 2021).

[52] *See* Due Process Preservation Order, *In re* Belk, Inc., No. 21-30630, ECF No. 62 (Bankr. S.D. Tex. Feb. 23, 2021).

Order not later than March 31, 2021."[53] Additionally, the order provided that "[[e]]ach person and government unit will have until March 31, 2021, to elect to opt out of the releases contained in the Plan or the Confirmation Order."[54] The Due Process Preservation Order further protected the rights of holders of claims by providing that "Any holder of a claim in Classes 1, 2, 3, 6 or 8 . . . may resolve any dispute with the Debtors about the payment or allowance of its claim in either "(i) any court of competent jurisdiction; (ii) any arbitration tribunal to the extent that such claim is arbitrable under applicable non-bankruptcy law; or (iii) this Court."[55] Classes 1, 2, 3, 6 and 8 encompassed *all* claims except for the First Lien Term Loan Claims, the Second Lien Term Loan Claims, and the Intercompany Claims. Moreover, the Due Process Preservation Order allowed for objection to any assumption or assignment of any executory contract or lease. [56]

The United States Trustee had filed an objection to the plan, largely on due process grounds. Having reviewed the Due Process Preservation Order prepared by the Court, the United States Trustee withdrew its objection on the grounds that the Due Process Preservation Order resolved its concerns.

With the parties agreeing to the Due Process Preservation Order, Judge Isgur approved the disclosure statement and confirmed the plan at around 10:00 a.m. on February 24, 2021. The confirmation came sixteen hours after the case was filed. The hearing on the motion to close the case was held on March 31, 2021, and the court issued a final decree closing the case on that day.

IV. The Beauty of Belk

The restructuring in *Belk* thus seems sensible. New money was coming into the company, maturities were extended, cash obligations on the funded debt were reduced, and all institutional investors were seeing their interests in the company reduced. It was a relative priority plan.[57]

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[53] *Id.* at 3.

[54] *Id.* at 2.

[55] *Id.*

[56] *Id.*

[57] A relative priority plan reduces the claims of the creditors against the company but does not eliminate the old equity interests. Douglas Baird has been the leading voice in

Although Belk remained highly leveraged, with its new ability to defer cash payments on some of the new debt for up to two years, Belk did not seem to be in risk of imminent default upon confirmation. With this by way of background, we can now address Professor LoPucki's claim that the confirmation of the plan in *Belk* was "lawless."

A. Not an "Upside Down" Plan

Professor LoPucki's main complaint about the "lawlessness" of the plan of reorganization in Belk is that it was, in his words, "upside down."[58] By this he means that it did not comport with the absolute priority rule because a junior class retained its interest despite the fact that a senior class did not receive payment in full.[59] This is indeed true: both the first lien lenders and the second lien lenders saw their claims against Belk reduced. Sycamore, while having its equity interest shaved nearly in half, still retained control of the reorganized debtor. Equity retained an interest even though the creditors were not paid in full.[60] Absolute priority was not followed, but this fact is irrelevant.

The problem with Professor LoPucki's reliance on the absolute priority rule in making his "lawlessness" assertion is that the absolute priority rule did not apply in *Belk*. Since the Bankruptcy Code became effective in 1979, the absolute priority rule has only applied where a *class* of impaired claims or interests votes against a proposed plan.[61] In Belk's plan,

rediscovering the doctrine of relative priority. *See* Douglas G. Baird, *Priority Matters,* 165 U. PENN. L. REV. 785 (2017).

[58] LoPucki, *supra* note 1, at 262-67.

[59] 11 U.S.C. § 1129(b)(2)(B).

[60] It may well be that the plan also would violate absolute priority based on the distribution to the second lien loan holders. The first lien holders were not paid in full and the second lien holders received a distribution under the plan. One cannot make a definite conclusion on this score, however, because we do not have a value of the underlying collateral. It may be the value of the collateral did go to the first lien holders, and they and the second lien holders then received distributions based on the unsecured portion of their claims. This possibility, however, seems unlikely given that, together with the ABL, all of Belk's assets were pledged.

[61] *See* 11 U.S.C. § 1129(b). Such was not true under the Bankruptcy Act. Under the Act, an individual creditor could scuttle a plan by invoking the absolute priority rule. *See* Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939). Professor LoPucki is wrong as a matter of law when he states, "The absolute priority rule applies to Chapter 11 plans." LoPucki, *supra* note 1, at 262. It only applies to a plan in which an impaired class

there were three classes that were impaired: the first lien loan, the second lien loan, and the equity interests. All other classes were either unimpaired or paid in full, and, as such, they were deemed by the Bankruptcy Code to consent to the plan.[62] All three impaired classes voted unanimously to approve the plan.[63] Indeed, this was not just a consensual plan – a plan where all the affected classes approve the plan[64] – it was a unanimous plan. Not a single creditor objected to the plan.[65]

Professor LoPucki's argument would have had greater force under pre-Code law. The Bankruptcy Act of 1898 required all plans to comport with the absolute priority rule. Even wide acceptance of a plan would not insulate the plan from attack. Indeed, in *Los Angeles Lumber,* the case that enshrined the absolute priority rule into the Bankruptcy Act, over 90 percent of the creditors had voted in favor of the plan.[66]

The rule that any dissenting creditor could invoke the absolute priority rule, however, was firmly rejected by the drafters of the Bankruptcy Code.[67] The theory behind the switch to class-wide voting in the Bankruptcy Code was that creditors are able to look after their own interests. Creditors can asset their options, and act accordingly.

There was nothing inevitable about the shape of the plan in *Belk*. All impaired parties seemed to recognize that Belk needed an adjustment to its capital structure. The sponsor (Sycamore) was willing to contribute new

does not accept the plan.

[62] *See* 11 U.S.C. § 1126(f).

[63] Even though Sycamore was putting in new money into Belk, Sycamore did not attempt to justify its receipt of equity in the reorganized Belk on that basis. *See generally*, Bank of America v 203 North LaSalle, 526 U.S. 434 (1999) (old equity may be able to participate in a reorganization where that participation is based on a new contribution of capital that has been market tested).

[64] *See* 11 U.S.C. § 1129(a)(8).

[65] First lien holders holding in total less than one percent of the first lien loan did not return a ballot.

[66] Case v. Los Angeles Lumber Prods., 308 U.S. 106, 111-12 (1939). For a history of Los Angeles Lumber, see Robert K. Rasmussen, *The Story of* Case v. Los Angeles Lumber Products: *Old Equity Holders and the Reorganized Corporation,* BANKRUPTCY LAW STORIES (Foundation Press 2007) (Robert K. Rasmussen, ed.).

[67] *See* Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations,* 44 STAN. L. REV. 69, 87-90 (1991) (describing the dissatisfaction with the Bankruptcy Act's absolute priority rule and the various proposals and ultimate resolution in the Bankruptcy Code).

money to the business and see its interest reduced, though it retained a controlling equity stake. There is no indication that the lenders wanted someone else to run Belk. The general decline in the retail industry since the buyout of Belk coupled with the disruption of the pandemic where not the making of the management team. That said, the lenders wanted a deal that was best for them economically and there was some divergence of interests among the lenders. Every lender who held a second lien loan also held first lien loan. Most of the lenders, however, only held first lien loans.[68] Thus while there were differing interests, each party had a sense of the economic interests of the other party. A deal was reached by sophisticated parties represented by counsel and other professionals, and given the various interests, it would be a mistake to second guess it.

One could always imagine other deals being struck within the parameters of Belk's situation. Maybe Sycamore could have contributed a bit more, maybe the debt could have been reduced by a touch more, or perhaps a tad more equity could have gone to the first lien holders at the expense of the second lien holders. In any negotiation, there are usually multiple plausible outcomes that will meet the basic objectives of each side. The important point, however, is that the parties here settled on one outcome which became the proposed plan. With consensus among the impaired classes, the plan met the Bankruptcy Code's standard for confirmation. It simply is not the case that the deal here was "lawless."

Professor LoPucki dismisses the fact that the plan in *Belk* was unanimous, arguing that we should not "overvalue" plan acceptance.[69] This is a startling statement. The drafters of the Code made plan acceptance central to the reorganization process. Acceptance by all impaired classes and interests was designed to prevent the application of the absolute priority rule and avoid the need for a valuation of the reorganized company.

Professor LoPucki makes two arguments in support of devaluing the unanimous nature of Belk's plan of reorganization. First, he asserts that the votes here were coerced and thus should not be given too much credence. Second, he points to the 90,000 parties in interest (i.e., the employees, the landlords, and the trade creditors) who were not allowed to vote on the plan.

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[68] The record does not reflect the amount of the first lien held by the second lien holders.

[69] LoPucki, *supra* note 1, at 296–300.

Neither point can withstand scrutiny. As to the limited voting parties, the Bankruptcy Code provides that only those who hold impaired claims or interests vote on a plan of reorganization.[70] The employees saw their employment continue without interpretation; the landlords saw rent paid on time; and the trade creditors saw their claims being paid in full in the ordinary course. One could argue that this limit of the franchise is a poor policy decision because it leaves out parties that are affected by the reorganization. Indeed, such assertions have been levelled in the past.[71] Regardless of what one makes of this criticism, it does not obviate the fact that in passing the Code, Congress made the decision to leave the contours of the plan in the hands of impaired creditors and interests.[72]

Professor LoPucki's first point for not "overvaluing" unanimous acceptance, the coercion of votes, requires more analysis. He asserts that those voting for the plan faced the "choice . . . between Belk's plan and a murky alternative in which creditors voted Belk's plan down, but Sycamore remained in control of Belk and Belk remained in control of the case."[73] There is a lot that needs to be unpacked and some important details to be added to this statement.

That Sycamore had a substantial degree of control in the negotiations leading up to the plan of reorganization is not an example of lawlessness; it is rather a manifestation of the law. The drafters of the Code made the considered decision to give control of a Chapter 11 case to the debtor. For example, the debtor has control over when to file for bankruptcy[74] and it has the exclusive right to propose a plan of reorganization for the first six months of a case.[75] Thus, it cannot be a cause of complaint the Belk had some degree of control over whether a bankruptcy would be filed, when it

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[70] *See* 11 U.S.C. § 1126(f).

[71] *See, e.g.*, Karen Gross, FAILURE AND FORGIVENESS (Yale University Press 1999) (arguing that Chapter 11 should take the interests of the community when a company is located into account).

[72] Even if the unimpaired parties could object, there is little reason to think that they would have found the plan objectionable. The plan added needed liquidity, reduced funded debt and extended maturities. It created an opportunity for the company to find its footing. From where we sit, it seems that, had the law been different and the unimpaired parties could have voted, they very well could have favored the plan.

[73] LoPucki, *supra* note 1, at 297.

[74] *See* 11 U.S.C. § 301.

[75] *See* 11 U.S.C. § 1121(b),(c).

would be filed, and what plan would be presented for confirmation. This is a central feature, not a bug of the bankruptcy system.

Nor can it be a complaint that Sycamore controlled Belk. Sycamore's control of Belk was due to the fact that it owned 88 percent of the Belk's stock. Delaware law (Belk is incorporated in Delaware) flirted for years with the idea that perhaps the fiduciary duty of a company's board of directors should switch from the shareholders to the entire company when a company approached the "zone of insolvency."[76] Subsequent case law, however, made it clear that boards owe no fiduciary duties to creditors or other constituencies.[77] With the Bankruptcy Code granting Belk control over which plan could be considered, and Delaware Law allowing Belk to advance the interests of its shareholders (Sycamore), it is implausible to assume that a plan that eliminated the old equity interests was going to be on the table.

Professor LoPucki also elides over the fact that the plan was not a take-it-or-leave-it offer made by Belk to the creditor constituency. Rather, the plan was the product of negotiations between Belk and Sycamore on the one hand and an ad hoc group of first lien lenders and an hoc group of crossover lenders on the other. In these negotiations, it seems that Sycamore was willing to loan new money to the company and write down its equity interest. If Sycamore was going to continue to oversee the company's operations, it insisted, in remaining in control of the reorganized company.[78]

As to the membership of the two ad hoc lender groups, the backstop commitment letter was signed by sixteen funds, seven of which held only first lien debt.[79] We do not know the precise holdings of each of these

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[76] *See* Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., 1991 WL 277613 (Del. Ch. 1991).

[77] *See* North American Catholic Education Program Foundation, Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

[78] This case is an example of what Vince Buccola has labelled "sponsor control." See Vincent Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization,* 90 U. CHI. L. REV. 1 (2023).

[79] These funds are Davidson Kempner Capital Management, Hein Park Capital Management LP, Nuveen Asset Managements, LLC, Jefferies Leveraged Credit Products LLC, Greywolf Loan Management, Voya Investment Management Co. LLC, and Guggenheim Partners Investment Management, LLC. The funds that held both first lien debt and second lien debt were Apex Credit Partners LLC, Assured, Blackstone Alternate Credit Advisors, LP, First Eagle, FS Global Credit Opportunities Fund/Blair Funding,

funds. We do know, however, that were nine funds in the cross-over group. These nine each held second lien debt, and that there were only ten holders of second lien debt. The tenth holder seems to have been Prisma Special Holdings, and it held a bit less than $10 million in second lien debt.[80] The ad hoc cross-over lenders who were part of the negotiations thus had sufficient holdings to ensure that the class of second lien holders voted in favor of the plan.[81] One would be hard pressed to conclude that these sophisticated funds negotiated a plan that shortchanged their interests. There is virtually no risk that the second lien holders were economically harmed by this transaction.

We do not know the amount of first lien loans held by the ad hoc group of first lien lenders and by the ad hoc group of crossover lenders. One would expect, however, that the total was a significant amount of the outstanding first lien debt. Belk, which initiated the negotiations, knew that it had to get a consensual plan of reorganization in order to be able to file a Chapter 11 plan under which Sycamore would retain a stake in the reorganized company. Moreover, when the negotiations started, it was a possibility that the resulting transaction would be implemented through a debt exchange offer. Such offers invariably have higher participation requirements than the class approval rules of Chapter 11.[82] Given that, it had an incentive to negotiate with lenders that had the ability to either guarantee class acceptance by the first lien holders or get very close. Indeed, when the RSA was announced, it had the support of holders that held 74 percent of the first lien debt.

Moreover, it is not as if all the first lien holders would want to be involved in the negotiations over how the debt was to be restructured.

Jefferies Leveraged Credit, KKR Credit Advisors (US) LLC, Katriona Investment Pte Ltd., MJX and SEIX. These all are sophisticated investors.

[80] *See* Declaration of Craig E. Johnson of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Joint Prepackaged Plan of Reorganization of Belk, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code at Exhibit B, *In re* Belk, Inc., No. 21-30630, ECF. No. 33 (Bankr. S.D. Tex. Feb. 23, 2021).

[81] The crossover group thus contained 90% of the holders of the second lien debt and 98% of the debt. These figures well exceed the one-half of holders and two-thirds of amount necessary for a class to approve a plan. 11 U.S.C. § 1126(c).

[82] William Bratton & Adam Levitin, *The New Bond Workouts,* 166 U. PA. L. REV. 1597, 1637 (2018) (reporting that half of the debt exchanges studied required or had at the time of their offer a 90% acceptance rate).

Today, much of the debt that is incurred in a leveraged buyout is sold to collateralized loan obligations ("CLO"), entities that pool and securitizes debt from a wide variety of borrowers and securitizes. A CLO is profitable to the extent that it keeps its expenses low. Unlike distressed debt investors, a CLO does not hire lawyers to carefully parse documents nor financial advisors to run detailed analysis of credits in its portfolio. It buys a diversified portfolio and is a passive investor. Participating in negotiating a plan of reorganization is not a typical business decision that CLOs make. The same is true for other type of institutions that commonly hold debt generated by leveraged buyouts, such as insurance companies. Given this, it is hard to see how anyone who wanted to be part of the negotiations in Belk was excluded. No creditor objected to being left out.[83]

To the extent that one can find concern with the actual negotiated results, it may be with the treatment of the new funds that were raised in the transaction. Recall that $225 million in new money was brought into Belk as part of the restructuring transaction for which Belk promised to repay $300 million. The additional $75 million in repayment obligations was allocated to existing lenders in two slices. The first slice – $45 million – would be shared by those first lien lenders that agreed to loan new money to the company. Had this opportunity been limited only to those hammering out the transaction, one would be worried that those not at the table were being exploited. In fact, however, the opportunity to make a new loan was not limited; all first lien holders were offered the opportunity to make the investment. The economics of the loan were incredibly attractive. While the interest rate of LIBOR plus 7.5 percent was not necessarily an attractive piece of the deal,[84] by adding an additional 36 percent in principal to what was funded more than compensates for that risk.[85] Indeed, the attractive addition was probably done as a way to induce first lien lenders to vote for

[83] This lack of objection distinguished *Belk* from the recent cases of *Patriot Coal* and *LATAM.* In those two cases, the RSA was negotiated among a subset of creditors, and creditors that were not part of the negotiation objected to the backstop fees collected by those who were part of the negotiations. *See* In re Peabody Energy Corporation, 958 F.3d 717 (8th Cir. 2020); *In re* LATAM Airlines Group, S.A., 643 B.R. 756 (S.D.N.Y. 2022).

[84] It is probably the case that the stated interest on the new money loan did not fully reflect the challenging environment in which Belk operated.

[85] To the extent that the interest rate is below market, only Sycamore was adversely affected by the rate. Whereas all other providers on new money received additional compensation, Sycamore's only return was the new loan itself in the amount that Sycamore lent to the business.

the overall plan. Only by voting for the plan would they enjoy the economics of the new loan. But that does not make it coercion in the sense that a lender is forced to vote against its own interest. Rather, the option to participate in the new money loan was just part of the economic judgment that a first lien holder made in deciding whether to join the plan.

Of course, by the time that the RSA was released stating that holders of 74 percent of the first lien debt had signed on, the realities would lead any rational first lien holder who had not signed onto the RSA to accept the plan as well. The 74 percent vote in favor ensured that the class of first lien holders was going to accept the plan. The other 26 percent, as in every case where the class voting requirements are met, could not prevent plan confirmation. A creditor in that position could object and force the court to do a liquidation analysis, but nothing suggests that this tactic would be fruitful. Liquidation of retail stores tend not to generate high returns. Of course, a liquidation analysis could require a longer stay in bankruptcy. Given an incentive to minority creditors not to engage in delaying tactics is not forcing them to vote for a plan they disfavor; it is compensating them for not pressing what would ultimately be a fruitless objection. In the end, all first lien creditors shared the $45 million in new debt claims pro rata and without objection. This situation is not a cause for concern.

The better area for potential critique is the $30 million in new debt that went to the backstop lenders. Each lender that signed the backstop commitment undertook to provide any shortfall in the $125 million that the first lien lenders were to raise. Liability on the backstop commitment was joint and severable, not pro rata. Arguably, the $30 million fee was designed to compensate the lenders for the risk that there would be no market among the first lien lenders for this debt. But the economics of the new money loan were so attractive that it is not surprising that all of the first lien holders voted in favor of the plan and exercised the option to participate in the new money loan. There thus seems to have been little risk that there would not be commitments of at least $125 million from the old first lien lenders. Certainly, Belk did not engage in a market test and see whether it could get a similar backstop commitment cheaper elsewhere. It appears that the backstop commitment lenders used their position as negotiating the plan of reorganization to increase their economic welfare as opposed to the first lien lenders who were not at the table.

Looking even deeper into the transaction, the $30 million fee that

was shared by all the lenders who signed the backstop commitment actually understates the compensation provided to some of the lenders who negotiated the deal. In addition to this commitment fee, the funds that signed the backstop letter but only owned first lien loans were to share an additional cash payment of $12 million when the plan went into effect.[86] Taken together, there was $42 million that was going to the lenders backstopping the new money loan.

Backstop fees that allow a subset of creditors to get a greater return than other creditors that hold the same type of claim have become common and controversial. Creditors who have been left out of the opportunity to backstop a financing have argued such fees violate Section 1123(a)(4), which requires that all creditors in a class receive the same treatment of their claims. Here, an objector could assert, the first lien holders who participated in the negotiations received a greater return on their investment than are those who were not part of the discussion.

Case law, however, does not condemn these fees. Both the Eighth Circuit Court of Appeals and the District Court for the Southern District of New York have rejected the argument of preferential treatment and have approved backstop fees. Both courts found that the fees were paid for the commitment and not on account of the claim, and therefore did not run afoul of §1123(a)(4).[87] Even had there been an objection to the backstop fees, and there was not, the bankruptcy court would not have been "lawless" in approving such fees.

To see why the backstop fees in *Belk* were not challenged, it may be that such fees are used to provide some creditors with an enhanced recovery in order to generate consensus around a plan of reorganization.[88] That seems to be the case in *Belk*. The $30 million backstop fee was to be shared among all the lenders who signed the backstop, but this does not appear to be enough to have gotten those who only held first lien loans to join. The group could have thought that the return generally provided to first lien

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[86] *See* Disclosure Statement, *supra* note 9, at Exhibit C, - Restructuring Term Sheet at 5 n.2.

[87] *See* In re Peabody Energy Corporation, 958 F.3d 717 (8th Cir. 2020); Ad Hoc Group of Unsecured Claimants v. LATAM Airlines, 643 B.R. 756 (S.D.N.Y. 2022). The courts also rejected the argument that the payment of fees meant that the plan was not proposed in good faith and that 203 North LaSalle required that the fees be market tested.

[88] *See* David A. Skeel, Jr., *Distorted Choice in Bankruptcy,* 130 YALE L.J. 366, 394 (2020).

lenders was too low; alternatively, they might have recognized their importance to forging a consensual plan and were able to capitalize on their leverage. In any event, the cost to Belk of getting the second group to join the plan was an additional $12 million.

The ability to receive compensation for reaching a deal may be necessary to ensure negotiations take place in the first instance. It is common for the professional fees of those who conduct the negotiation to be paid by the debtor, as was the case in *Belk.* Yet the lenders who engaged in the negotiation also had to invest their time as well. The other holders of the first lien loan did not have to spend the effort, and thus could free ride on the efforts of the negotiating group. Indeed, without the promise of compensation for their efforts, it may well be the case that some of the lenders would not have found it in their interest to begin discussions.[89]

Of course, one could easily imagine a situation where the backstop fee does more than compensate the negotiating lenders. Too high a fee could transfer value from those not at the bargaining table to those that are seated. While reasonable people can disagree over how closely a bankruptcy court should scrutinize a fee, such scrutiny should only take place when there is an objection. In *Belk,* no party, including no first lien holder outside of the ad hoc group objected to the plan. The non-ad hoc lenders were provided the details of the restructuring transaction roughly a month before Belk filed for bankruptcy, giving them sufficient time to review the details. In fact, rather than objecting, the non-ad hoc first lien lenders agreed to the plan. Absent an objection, there is little reason for the bankruptcy judge to intervene.

In sum, Belk's plan of reorganization was unanimously approved by the impaired creditors, after intense negotiations among the affected parties. Both the Bankruptcy Code and the realities of the situation demand that a bankruptcy court respect this decision. Professor's LoPucki's criticisms of the substance of Belk's plan of reorganization cannot withstand careful scrutiny.

[89] David Skeel has pointed to the necessity to encourage those putting an RSA together to participate in the negotiations as a basis for approving RSAs that provide compensation to these creditors. See *id.*

B. Procedural Objections

In addition to the substance, Professor LoPucki also attacks the *Belk* restructuring on procedural grounds. He points to a number of Bankruptcy Code and Bankruptcy Rule provisions that he asserts *Belk* did not comply with in its sixteen-hour reorganization. We address each of these complaints in turn. Before doing so, however, we call attention to an innovative feature of the case, the bankruptcy court's Due Process Preservation Order.

1. The Due Process Preservation Order

When Belk filed for bankruptcy late on Tuesday, February 23, 2021, it filed a plan that prepetition had been approved by all of the affected parties. The attorneys that crafted the plan were comfortable that they complied with all the Bankruptcy Code's requirements. They were intimately familiar with the case and its affect.

The bankruptcy judge assigned to the case did not have such familiarity when the case was filed. He could have accepted the word of all parties before him that they were the only ones who were affected. He was not willing to do so, however. Judge Isgur, not knowing what he did not know, wanted to ensure that if the lawyers before him were wrong and there were affected parties with legitimate complaints about the plan, that they would have the opportunity to assert their rights.

For this reason, on morning after the filing, Judge Isgur informed the parties that he was uncertain whether he would confirm the plan unless the potential rights of third parties were protected. To this end, he proposed a "due process preservation order." The basic thrust of the order was that any party that was not before the court had thirty-five days to object to the plan. By issuing the Due Process Preservation Order, the bankruptcy court allowed each creditor which was not a first lien or second lien holder to litigate any dispute with Belk in a non-bankruptcy court. The judge explained this reasoning at pages 31-32 of the transcript by saying "there are provisions in the plan that I saw that would have allowed people to be dragged here, having to deal with me, over their small claim that they have in a town in North Carolina or Tennessee or Virginia. And I wanted to say to people that if you were in one of those unimpaired classes, 1, 2, 3, 6, or 8, you can resolve your disputes in any court of competent jurisdiction,

in any arbitration tribunal to the extent that arbitration is provided, or here."[90]

Moreover, the Due Process Protection Order allowed for objection to any assumption or assignment of any executory contract or lease. As Judge Isgur stated at the confirmation hearing, "From a practical point of view, my experience has been that I'm not going to see any landlords that don't want their leases assumed and assigned, but I may. And if I do, they have every right to have all of their rights vindicated and they shouldn't be prejudiced by what we're doing with such limited notice."[91]

As set forth on pages 20 and 37 of the confirmation hearing transcript, the bankruptcy court was concerned that the Due Process Preservation Order was not just entered on the docket but also sent by mail to affected creditors. Thus, Judge Isgur required that the Due Process Preservation Order was served on all 90,000 creditors.

In short, the parties before the court represented that there was no affected party that would object to the rapid confirmation of the Belk plan. The Due Process Preservation Order allowed the court to confirm the plan, and yet ensure that any adversely affected party could assert their interests.[92]

In the end, two objections were filed. One was by a lessor where the lease was terminated before the case was filed.[93] The objector wanted to clarify that the plan did not allow Belk to either assume or assign the terminated lease. The objection was later withdrawn, noting that the parties

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[90] *See* Transcript of First-Day and Confirmation Hearing at p. 31-32, *in re* Belk, No. 20-30630, ECF No. 98, (Feb. 26, 2021) (hereinafter "Confirmation Hearing Transcript").

[91] *Id.* at 33.

[92] Professor LoPucki complains that the protections offered by this order are "illusory." LoPucki, *supra* note 1, at 3. He reaches this conclusion by pointing to portion the confirmation order which limits how the order can be modified. *Id.* The problem with this argument is that, by its express terms, the Due Process Preservation Order provides, "To the extent of any conflict between this Due Process Preservation Order and the Confirmation Order or the Chapter 11 Plan, this Due Process Preservation Order controls." Due Process Preservation Order, p. 2, *In re* Belk, Inc., No. 21-30630, ECF No. 62 (Bankr. S.D. Tex. Feb. 23, 2021). It is thus impossible for the terms of the confirmation order to override the protections contained in the Due Process Protection Order.

[93] *See* Sampson Crossing, LLC's Objection to Debtors' Assumption of Non-Executory Store Lease, *In re* Belk, Inc., No. 21-30630, ECF No. 160 (Bankr. S.D. Tex. Mar. 19, 2021).

had reached agreement on the issue.[94]

The second objection was to the calculation of the cure amounts on a lease that the debtors had assumed.[95] The lessor did not object to assumption of the lease. (Indeed, given the pressure on commercial real estate during the COVID pandemic, it would be difficult to imagine a landlord making such an objection.) Rather, the dispute was on the limited issue of what was the appropriate amount of the cure. The parties had discussed this issue and narrowed their disagreement to $12,222.56. The objection was filed on the last day set by the Due Process Preservation Order "as a precautionary measure."[96] There is no further reference to this objection in the record, suggesting that the parties resolved the dispute.

2. Fee Application

Professor LoPucki complains that there were no fee applications for the expenses of professionals filed in *Belk*.[97] Belk did file for and obtained approval of its professionals, including its lawyers Kirkland & Ellis. The approval order for Kirkland allowed for the payment for all *prepetition* legal work performed by Kirkland. In order to allow for time to object to the retention of the professionals, the bankruptcy court's approval came roughly a month after the case was filed and the plan confirmed. The confirmation order, which was approved the day after the plan was filed, provided that *after* confirmation the professionals did not have seek court permission to retain and pay the professionals.[98]

Thus, the court expressly approved the fees incurred up to the filing of the petition, and the fees incurred after confirmation. What remains are the attorneys' fees for the sixteen hours between the filing of the petition

[94] *See* Sampson Crossing, LLLP's Notice of Withdrawal of its Objection to Debtors' Assumption of Non-Executory Store Lease, *In re* Belk, Inc., No. 21-30630, ECF No. 195 (Bankr. S.D. Tex., April 27, 2021).

[95] *See* Limited Objection of ARCP MT Morgtanton, NC, LLC to Cure Amount, *In re* Belk, Inc., No. 21-30630, ECF No. 180 (Bankr. S.D. Tex., Mar. 31, 2021).

[96] *Id.* at 3.

[97] *See* LoPucki, *supra* note 1, at 279-82.

[98] Professor LoPucki acknowledges that the bankruptcy court did approve these fees, but objects to the fact that the court did not expressly review the actual fees themselves. *Id.* at 281. Yet no party objected to these fees. Moreover, given the fact that Kirkland regularly appears in cases in the Bankruptcy Court for the Southern District of Texas, it is safe to assume that the court knew the basic structure of Kirkland's fees.

and confirmation. Professor LoPucki is correct that there was no application filed to cover these fees. But he overlooks the reason for the lack of application. At the hearing to close the case, Judge Isgur noted that it would be costly to prepare a set of fee applications for the sixteen hours between filing and plan confirmation. Four different groups of professionals were approved to work during these 16 hours. He suggested that he would be willing to waive the requirement of multiple fee applications so long as the confirmation order put a limit on the amount of fees that could be charged to the estate. The lawyers consulted with their clients, and the clients agreed to this proposal.[99] The final decree thus authorizes the payment of fees for the period in bankruptcy up to an aggregate of $380,000 for all four professionals, without the filing of fee applications.[100]

3. Meeting of the Creditors

Professor LoPucki next points to the failure to have a meeting of the creditors under § 341(a).[101] He recognizes that, by its express terms, § 341 allows a court to order the United States Trustee not to have a hearing "for cause . . . if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case." The confirmation order in *Belk* waived the § 341 hearing.[102] Professor LoPucki faults the general practice of courts in granting these motions without an express finding of "cause." Yet cause is readily apparent, at least in the case of Belk – the votes had been solicited, all voting creditors that voted in favor of the plan, and the remaining creditors were unimpaired. A meeting of creditors would obviously serve no purpose. Indeed, Belk's motion to waive the Section 341 hearing expressly mentions these reasons as providing the necessary cause to dispense with the meeting.[103] Again, the court in *Belk*

[99] *See* Transcript of Motion Hearing at p. 6-13, *In re* Belk, Inc., No. 21-30630, ECF No. 197 (Bankr. S.D. Tex. May 16, 2021).

[100] *See* Final Decree Closing Certain of the Chapter 11 Cases at ¶ 9, *In re* Belk, Inc., No. 21-30630, ECF No. 171 (Bankr. S.D. Tex. Mar. 31, 2021).

[101] *See* LoPucki, *supra* note 1, at 286-88.

[102] Order Approving the Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Prepackaged Chapter 11 Plan at p. 52, *In re* Belk, Inc., No. 21-30630, ECF No. 61 (Bankr. S.D. Tex. Feb. 24, 2021).

[103] *See* Debtors' Emergency Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Establishing Plan and

followed the law, it did not run afoul of it.

4. The Independent Directors

Professor LoPucki's objections continue with the decision by the special committee of independent directors to settle the potential fraudulent conveyance claim relating to the 2016 dividend. He notes that some have questioned how "independent" these directors are a real-world matter, given that some appear repeatedly in various cases, often with Kirkland representing the debtor.[104] Whatever one thinks about the general point, it takes little to see the reasonableness the directors' decision here. Whether or not the dividend was a constructive fraudulent conveyance depends on a finding that the payment left Belk insolvent, too thinly capitalized, or unable to pay its bills as they become due. Any litigation on this question would have been an uphill battle. Belk received a solvency opinion in connection with the dividend before the it was issued, thus providing contemporaneous evidence that the dividend did not leave the company insolvent. Belk also continued to pay its bills after it issued the dividend; indeed, it has continued to do so to this day. Finally, there is no evidence to suggest that, in September 2016, Belk was too thinly capitalized. The directors' decision approving the settlement falls squarely within their business judgment. There may be cases where there is a strong fraudulent conveyance claim where one may wonder about the decision of independent directors not to pursue it. *Belk* is not such a case.[105]

Moreover, the dividend payment was well known to the ad hoc groups negotiating with Belk. To the extent that they thought that this potential litigation had any value, they could have sought concessions during the negotiations in terms of a larger payout. It would be surprising if the

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Disclosure Statement Objection Deadlines and Related Procedures, (III) Approving the Solicitation Procedures, (IV) Approving the Confirmation Hearing Notice, and (V) Waiving the Requirements that the U.S. Trustee Convene a Meeting of Creditors and the Debtors File Schedules and SOFAS at ¶ 22-23, *In re* Belk, Inc., No. 21-30630, ECF No. 11 (Bankr. S.D. Tex. Feb. 23, 2021) (hereinafter "Scheduling Motion").

[104] *See* Jared A. Ellias, Ehud Kamar & Kobe Kastiel, *The Rise of Bankruptcy Directors,* 95 SO. CAL. L. REV. 1083 (2022).

[105] In addition to the challenges in proving the merits of the fraudulent conveyance claim, creditors seeking to set aside the dividend would face a strong statute of limitations defense. The dividend was issued in September 2016, and the North Carolina law on voidable transfers has a four-year statute of limitations. See N.C. Gen. Stat. §39-23.9 (2022).

sophisticated parties representing the first lien holders and the second lien holders did not press this point when discussing with Sycamore how to allocate the value of the reorganized Belk among the various investors.

5. The Third Party Releases

Professor LoPucki points to the third party releases in the plan.[106] Third party releases are an important and disputed topic the main question of which is outside the scope of this article.[107] That said, in *Belk* their inclusion in the plan does not support the accusation of "lawlessness" hurled by Professor LoPucki at the bankruptcy court. In the Fifth Circuit, such releases cannot be included in a plan absent consent of those granting the release.[108] The Due Process Preservation Order required that the debtors work with the US Trustee to create "an appropriate opt out notice to be served on each 'Releasing Party' . . ." [109] The US Trustee following this order worked with the lawyers for the debtor and the court to allow creditors to opt of out the release. The US Trustee was satisfied that this procedure provided the necessary consent under governing Fifth Circuit law.[110] The court approved the notice.

6. The Notice of the Chapter 11 Filing

Professor LoPucki takes fault with the notice of the filing of the case

[106] *See* LoPucki, *supra* note 1, at 292-94.

[107] The Second Circuit Court of Appeals recently approved the third-party releases in the Purdue Pharma chapter 11 case. In doing so, it deepened the split among the courts of appeals on the availability of such releases. *In re* Purdue Pharma, LP. 69 F.4th 45 (2d Cir. 2023). The Supreme Court has granted certiorari in *Purdue* in order to resolve this split. *See* Harrington v. Purdue Pharma, 23-124 (S. Ct. Aug. 10, 2023).

[108] *See* In re Pacific Lumber Co., 584 F.3d 229 (5th Cir. 2009).

[109] Due Process Preservation Order, ¶ 2, *In re* Belk, Inc., No. 21-30630, ECF No. 62 (Bankr. S.D. Tex. Feb. 23, 2021).

[110] Professor LoPucki asserts that the unimpaired creditors may have released valuable causes of action. *See* LoPucki, *supra* note 1, at 293. He states that "Sycamore may have been liable for the mismanagement that landed Belk in bankruptcy and for the $135 million dividend payment." *Id.* The problems with this statement are that there is no showing that Belk was mismanaged, no legal theory on which Sycamore could be liable to other creditors were there mismanagement, and no showing that the dividend was a constructive fraudulent conveyance.

provided to all parties in interest. He points out that even in prepackaged plans, creditors are entitled to 28-days' notice.[111] Here, the creditors received notice on January 26, 2021, and the bankruptcy case was filed February 22, 2021, 28 days later. The problem, according to Professor LoPucki, is not the lack of notice, rather, it is that the notice was given *before* the case was filed rather than *after* the case was filed.

As Adam Levitin has shown, the process of approving 28-day notice before bankruptcy started well before *Belk*.[112] As Professor Levitin also points out, Bankruptcy Rule 9006(c) does allow a court to shorten the 28-day time period.[113] In *Belk,* the motion setting forth the timeline for the case cited to this provision and to cases in both the Southern District of Texas and the Southern District of New York that approved this type of procedure.[114] Moreover, the Court made explicit findings on the record as to why it was shortening time under Rule 9006: "[T]he bankruptcy rules say that we need to handle things on an expedited matter on an emergency basis if needed, given the circumstances. My circumstances are 17,000 jobs are at risk. The stores are at risk. The landlords are at risk. I have a really, really good reason, and the declarations that are there, assuming they come into evidence, to act promptly. But none of that can impair somebody's due process rights, so my purpose in this order is to be certain that all those due process rights are fully preserved."[115] Thus, the *Belk* proceeding once again complied with the applicable bankruptcy rules.

C. Venue

At a deep level, Professor LoPucki's considerable ire is not really directed at *Belk* itself. Rather, Belk and its restructuring is just a prop for his main target – the permissive venue provisions for bankruptcy cases introduced as part of the Bankruptcy Code and the practices that have evolved over the years in bankruptcy cases.[116] Professor LoPucki has been

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[111] *See* FED. R. BANKR. PRO. 2002(b).

[112] *See* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy,* 2023 U. ILL. L. REV. 351.

[113] *See* FED. R. BANKR. PRO. 9006(c).

[114] *See* Scheduling Motion, *supra* note 99, at ¶ 10 and p.17.

[115] Confirmation Hearing Transcript, *supra* note 90, at 35-36.

[116] *See* 28 U.S.C. § 1408. An excellent even-handed summary of the debate and the more than two decades worth of articles on the venue issues is found in a white paper

a vocal critic of the extant venue provisions for decades. In his telling, bankruptcy courts "compete" for cases. There is no doubt that some bankruptcy courts take concerted action to attract large cases including by offering prompt hearings on important matters and applying judicial expertise by capable judges (both good things in our view). It is not this competition to which Professor LoPucki objects. Rather, he asserts that they also compete by ignoring the law and doing whatever the party filing the case wants. Like the proverbial grand jury and the ham sandwich, the court will approve anything that comes before it, regardless of the underlying merits.[117]

Like third party releases, this article is not the place to rehash this debate.[118] As it relates to *Belk,* however, it is true that the Southern District of Texas has become a popular venue for large companies. In 2015, the court issued standing procedures designed to attract large cases to Houston.[119] There is no evidence available as to why this occurred. One could speculate, as Professor LoPucki does, that the court sought to become a magnet for cases. That, however, is not the only possible explanation for the court's actions. For years Houston lawyers had been frustrated with the situation where companies that were based in Houston filed Chapter 11 cases in other jurisdictions.[120] This frustration peaked with the 2001

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prepared by members of the National Conference of Bankruptcy Judges. *See* Terrence L. Michael, Nancy V. Alquist, Daniel P. Collins, Dennis R. Dow, Joan N. Feeney, Frank J. Santoro, and Mary F. Walrath, *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741 (2019).

[117] In 1985, New York Supreme Court Chief Justice Sol Watchler said "Any good prosecutor can get a grand jury to indict a ham sandwich." See Ben Zimmer, *'Indict a Ham Sandwich' Remains on the Menu for Judges, Prosecutors*, THE WALL STREET JOURNAL (June 1, 2018, 10:24 a.m.), https://www.wsj.com/articles/indict-a-ham-sandwich-remains-on-the-menu-for-judges-prosecutors-1527863063.

[118] Those interested in the current state of the debate can begin with Michael, et al., *supra* note 115. Important work since that article includes Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars,* 37 EMORY BANKR. DEV. L.J. 436 (2021); Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy,* 2023 U. ILL. L. REV. 351.

[119] The current version of the Bankruptcy Court for the Southern District of Texas's standing order for complex cases can be found at: https://www.txs.uscourts.gov/sites/txs/files/Complex_11_Procedures_01032023.pdf.

[120] Attorneys in Houston made an effort to become more amenable to large cases back

bankruptcy of Enron. Enron, one of the largest companies ever to file for bankruptcy, was a Houston-based company but instead of filing in Houston, it filed its Chapter 11 petition in the Southern District of New York. One could view the standing order for complex cases as a way to keep Houston cases in Houston. Of course, given current law, one cannot make a venue attractive to companies based in Houston without it being attractive to companies based elsewhere. Regardless of whether it was through design or happenstance, there is no question that Houston has become a preferred bankruptcy venue.[121]

Professor LoPucki has been a leading voice in favor of changing the venue provisions. He has advocated for decades that the law should be changed. No matter one's view of the current venue provisions, Professor LoPucki is incorrect when he states, "Belk had no grounds for Houston venue."[122] Belk's corporate headquarters are indeed in Charlotte, North Carolina, not Houston, Texas. Belk, however, like virtually every large corporation, consists of a number of related entities. Those in charge of the restructuring decided that 17 of the entities needed to file Chapter 11 to effectuate the reorganization. As is common, the 17 cases would then be

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in the late 1990s. This effort predates the appointment of the current bankruptcy judges in the Southern District of Texas. Then, bankruptcy judges noticed that large companies based in Houston filed elsewhere. Part of the reason was that the local bankruptcy courts refused to authorize attorney fees at an hourly rate that exceeded the rates charged by attorneys in Houston. The bankruptcy judges consulted with local attorneys over what could be done to remedy this situation. After receiving a report by a committee comprised of local bankruptcy judges and local attorneys on how to make Houston more attractive for large Chapter 11 cases, one bankruptcy judge announced, "This is the sound bite. The war on fees is over." See Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations,* 94 NW. L. REV. 1357, 1369 (2000).

[121] In the first half of 2023, the Southern District of Texas was the second most popular bankruptcy venue for large cases, with 27 such cases filed in that court in the first six months of the year. See Jeffrey P. Fuller, *ANALYSIS: Big Bankruptcy Cases on a Roll; Delaware Still Leads*, BLOOMBERG LAW (Sept. 7, 2023, 3:15 p.m.), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThhLTZhNjItZDQzZi1hMzhiLWVmNmY5Zjk3MDAwMSIsImN0eHQiOiJCTEFXQSIsInV1aWQiOiJJVEZQbVNmc3pScVM5cTVQMzhteU5RPT04cVdaW1k5NEJ0eGVQenBYeHVqUlBRPT0iLCJ0aW1lIjoiMTY5NDE5NjQzODE3NSIsInNpZyI6IngvcUc1cVhoYVRvVXdrWXNJZmI4b2hxMHFpUT0iLCJ2IjoiMSJ9?source=newsletter&item=body-link®ion=text-section.

[122] *See* LoPucki, *supra* note 1, at 248.

consolidated into a single proceeding. In *Belk*, when one examines the 17 petitions that were filed, 16 of them stated that the basis of the jurisdiction was that they were an affiliate of debtor that had already filed. The petition for Belk Department Stores, LP, on the other hand, lists the basis of venue as being that the "Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district."[123] The petition was signed under penalty of perjury. Venue was appropriate in the Southern District of Texas under current law proper for Belk Department Stores, LP, and thus the other 16 companies legitimately filed in the Southern District as affiliates of this entity.

D. Feasibility

Professor LoPucki's final complaint about the reorganization of Belk is that the bankruptcy court "did not take the issue of feasibility seriously."[124] Section 1129(a)(11) in the so-called "feasibility test" provides that a plan can only be confirmed if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization . . . ."[125] In *Belk,* no party objected to the plan on the ground that it was not feasible. The parties that negotiated the RSA – the company's management, the equity sponsor, and the debt holders – all had access to detailed financial information about the current operation of Belk. The materials presented to the court contained declarations by the companies' CFO[126] and one of their financial advisors including financial projections.[127] The projections show an increasing EBITDA from a negative $71 million in FY 21 to a positive $250 million in FY 24. Thus, the cash flow from operations would be sufficient to cover the interest expense for FY24 of $172 million. To be sure, the company still projected to have a net loss in FY 24, but this was due to noncash items of depreciation and

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[123] Voluntary Petition for Non-Individuals Filing for Bankruptcy at p. 3, *In re* Belk Department Stores, LP, No 21-30625, ECF No. 1 (Bankr. S.D. Tex. Feb. 23, 2021).

[124] *See* LoPucki, *supra* note 1, at 299.

[125] 11 U.S.C. § 1129(a)(11).

[126] Declaration of William Langely, Chief Financial Officer of Belk, Inc., in Support of Confirmation of the Joint Prepackaged Plan of Reorganization of Belk, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, *In re* Belk, No. 21-30630, ECF No. 25 (Bankr. S.D. Tex. Feb. 23, 2021)

[127] *See* Financial Projections, *supra* note 46.

amortization.

Of course, financial projections are as much an art as a science. Predicting the future is always challenging. When Belk filed its Chapter 11 case, the country was still in the middle of the COVID pandemic that made projections even more speculative. That said, there was no evidence in front of the court that the plan in *Belk* was not feasible.

E. Other Objections to the Current System

Professor LoPucki concludes his piece with a litany of other alleged sins of modern bankruptcy courts more generally.[128] We have no desire to engage with these disputes; our focus in this piece is firmly on *Belk*. That said, we want to note that we regard Professor LoPucki's other claims to be as contestable as his claims about *Belk*.

V. Conclusion

The story of *Belk,* once placed in appropriate context, is a straightforward one. The case was a restructuring of Belk's balance sheet among the sophisticated parties that held all of Belk's funded debt and equity that were being adjusted. General unsecured creditors and workers were unaffected. All leases and executory contracts were assumed. Debt was reduced, new money was invested and maturities were extended. Cash flow demands were lessened, at least for two years. One could imagine almost an infinite number of permeations. Maybe Sycamore could have been induced to contribute a bit more. Maybe the backstop lenders could have taken a bit less. Or maybe not. During the negotiations, everyone knew the state of play, and those at the table knew the interests of each negotiating party.

Even though Belk's Chapter 11 case complied with every requirement of the Bankruptcy Code and Bankruptcy Rules, it does not mean that all is copacetic with Belk. The bankruptcy court has no power to alter the fundamental forces that continue to roil the retail industry. COVID may be over, but Amazon is not. Indeed, Belk has now used up part of the runway that it constructed in its restructuring, exhausting its PIK-

[128] *See* LoPucki, *supra* note 1, at 300–09.

toggle options, and now has to pay cold hard cash on all of its first lien debt. When Belk's obligations to pay cash on its loans increased, the credit rating on the loans was reduced in February 2023.[129] The intervening two years have not seen a significant rebound in the retail sector. Belk bought itself some time, but that time may be running out.

In the end, *Belk* is not a remarkable restructuring transaction. It is the result of a well-functioning restructuring system. From the outside, it looks like the product of hard bargaining among financially sophisticated parties where the majority whose interest was affected had a seat at the table. To the extent that some first lien holders were not part of the bargaining, they would not have wanted to be involved. While Professor LoPucki objects to the plan of reorganization that was hammered out, the affected creditors did not. The provisions of the Bankruptcy Code were followed. That we have a bankruptcy system that does not upset such deals is a cause for celebration. That is the beauty of *Belk.*

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[129] Reshmi Basu, *Sycamore-Backed Belk Expects Lower Sales and Rising Debt Costs*, BLOOMBERG LAW (July 6, 2023, 4:12 p.m.), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X50AA6PS000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvODIyZGFmMjNjOWYxY2YyMmU0OTNiMzg1NThhNzYwNjgiXV0--a07f8c5d090f18b79c83cca68f39d833c33313eb&bna_news_filter=bloomberg-law-news&criteria_id=822daf23c9f1cf22e493b38558a76068&search32=Hu8STufURNwVdabe6E9XWw%3D%3Dfa5CxkdsZf625GtWBxZKoou3nHjBP2oPl5HLgD3NOoz6wAOX6NBu0jDdx-tphLR3zmgPxs-Unxhq1Duf1Z6pR7E12TGTFGS8gs33__xEam0_m5j5NHWTizSxbV_QlSwS.